

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

IN RE)	
)	
JACK KENNETH MIRTH and)	Case No. 98-20165
RUTH GEORGE ANN MIRTH,)	
)	
)	MEMORANDUM OF
)	DECISION
Debtors.)	and ORDER
)	
)	
)	
)	
NORTHWOOD ENTERPRISES, INC.)	Case No. 97-20244
d/b/a Northwood Land Company,)	
d/b/a Diversified Construction Group,)	
)	
Debtor.)	
)	
)	
)	
NORTHWOOD LAND COMPANY,)	Case No. 97-20243
INC.,)	
)	
Debtor.)	
)	
)	
)	

P&J ENTERPRISES, INC., d/b/a)	Case No. 97-20242
SYRINGA REALTY, d/b/a JOHN L.)	
SCOTT REAL ESTATE, d/b/a)	
CENTURY 21,)	
)	
Debtor.)	
)	
_____)	

Jack Mirth and Ruth Mirth, Cocolalla, Idaho, Pro Se Debtors.

Richard W. Sweney, LUKINS & ANNIS, Coeur d'Alene, Idaho, for C. Barry Zimmerman, Trustee.

H. James Magnuson, Coeur d'Alene, Idaho, for S. David Swayne, Trustee.

Michael E. Ramsden, RAMSDEN & LYONS, Coeur d'Alene, Idaho, for Lakeshore Tie & Lumber, Inc., Lewis R. Kulczyk and Vicki Donaldson.

Mark A. Ellingsen, WITHERSPOON, KELLEY, DAVENPORT & TOOLE, P.S.,
Coeur d'Alene, Idaho, for Bluegreen Corporation of Montana.

Thomas E. Cooke, Priest River, Idaho, for Kiss Enterprises, Inc. and Byron Lewis.

Bruce Anderson, ELSAESSER, JARZABEK, ANDERSON, & MARKS, Sandpoint, Idaho, for Ford Elsaesser, Receiver for the Debtors in Northwood Enterprises, Inc., Northwood Land Company, Inc., and P&J Enterprises, Inc.

This matter comes before the Court in each of the above chapter 7 cases upon the motion for relief from the automatic stay filed creditors Lakeshore Tie & Lumber, Inc., Lewis R. Kulczyk and Vicki Donaldson (hereinafter collectively referred to as "Lakeshore"), and its related motion for an order estimating its unliquidated claim. While the above chapter 7 proceedings are

neither jointly administered nor substantially consolidated, *see* Rule 1015, identical motions were filed by Lakeshore in each of the four cases and simultaneously brought on for hearing. The motions were opposed by several parties in interest as discussed below.

This decision and order resolves the motions in each of the four cases and constitutes the Court's findings and conclusions on these contested matters. Rules 7052 and 9014. The Court determines that both motions shall be denied.

BACKGROUND

Chapter 7 petitions were filed in April 1997 on behalf of Northwood Land Company, Inc., Northwood Enterprises, Inc., and P&J Enterprises, Inc., with each such petition being filed by Ford Elsaesser, who was serving in the role of receiver for these entities pursuant to state law. Barry Zimmerman was appointed Trustee in each of these three cases.

Jack and Ruth Mirth ("Mirth") filed a voluntary chapter 13 petition in March 1998. This case was later converted to a liquidation under chapter 7 and David Swayne was appointed Trustee.

The receiverships resulted from the entry of an order on December 13, 1996 by District Judge James R. Michaud in the case of *Lewis R. Kulczyk and Vicki Donaldson, individually and as husband and wife; Shirley V. Olin and Lakeshore*

Tie & Lumber Inc., an Idaho Corporation, Plaintiffs v. Jack K. Mirth and Ruth G. Mirth, husband and wife, dba Northwood Consulting Group, dba Diversified Construction Group; Northwood Enterprises, Inc., Northwood Land Co., Inc., an Idaho Corporation, and P & J Enterprises, Inc., an Idaho Corporation, dba Syringa Realty, Defendants, Case No. CV-95-00003, District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner (hereinafter the “state court order”). The state court order was entered upon the stipulation of the Plaintiffs and Defendants in that litigation.

By virtue of the state court order, the litigation was dismissed and all properties, real, personal, or intangible of any of the Defendants or any entities related to the Defendants as of December 3, 1996 were to be disclosed to and pooled by the receiver, Mr. Elsaesser, who was to marshal the assets and pay off debts and liabilities of the Defendants and the Defendants’ businesses. The net proceeds of the assets were then to be split between the parties, with 90% going to the Lakeshore Plaintiffs and 10% to the Debtor Defendants. The state court order went on to address several specific properties and assets, and certain details concerning the receivership and liquidation process.

As noted, the receiver in April of 1997 filed bankruptcy petitions for the corporate Debtors. Since that time, the Trustee in these cases has obtained

approval for the sale of several assets and he continues to administer these estates.¹

The Pending Motions

Lakeshore has moved for relief from the automatic stay, § 362(d), in order to effect what it characterizes as a setoff. In reliance upon the state court order, Lakeshore asserts that it is entitled to 90% of the proceeds of sale of certain assets. Once those properties are liquidated and the “net proceeds” are determined, Lakeshore recognizes that the Debtors’ estates are entitled to 10% of those net proceeds.

But Lakeshore asserts that it will ultimately have unpaid claims owed by the various Debtor Defendants significantly in excess of any 10% distributable to those Defendants. Therefore Lakeshore seeks stay relief in order to effect a setoff of those 10% distributions against its unpaid claims.

It is in this regard that the other motion of Lakeshore becomes relevant. Lakeshore seeks an order estimating its allowed unsecured, and as yet unliquidated, claim against all the Debtors. Lakeshore asserts that the starting

¹ The Mirths individual chapter 7 proceeding is being administered by a separate Trustee, Mr. Swayne. In that chapter 7 case, numerous creditors have litigated § 523 dischargeability actions against the Mirths, and the Court has recently issued decisions on several of those matters. Additionally, a default judgment has recently been entered against the Mirths on a § 727(a) discharge complaint brought by their Trustee.

point for calculation is an obligation of \$1,619,721.27 against the Debtors collectively. *See* Motion for Relief from Automatic Stay, at pp. 3, 5.

Lakeshore notes that no final judgment was ever entered liquidating the claim, because of the Mirths' bankruptcy filing in 1997 (a prior proceeding, case no. 97-20893, superseded by the instant case, no. 98-20165) and because of the receiver's filing of the other three petitions.

Bluegreen Corporation of Montana, Kiss Enterprises, Inc., and Bryon Lewis have all filed objections to the motion for relief from stay, and opposition was also asserted at hearing by the two Trustees.²

The Court took the matter under advisement following hearing in order to more fully review the record and the contentions of the parties.³

DISCUSSION

Setoff

² The Trustee in the corporate cases also objected to the stay relief motion based upon improper service and notice. The denial of the motion on other grounds moots the procedural objection.

³ Delay in resolution was, though unfortunate, practically unavoidable. Not only do these bankruptcy proceedings extend back several years, with a great deal of the proceedings in these cases heard by other bankruptcy judges, the litigation goes back many years before that in the state court context. Even a superficial review of these files reveals that the financial affairs of the Mirths and the Mirths' corporations were exceedingly complex and convoluted. The same type of problem was encountered in the several adversary proceedings the Court has heard. *See*, n.1, *infra*.

The automatic stay prohibits “the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor” unless stay relief is first obtained. § 362(a)(7). A creditor’s endorsable right to setoff under applicable law may constitute “cause” for stay relief under § 362(d)(1).

Setoff is governed by § 553 of the Code which recognizes, in bankruptcy, any otherwise proper right of a creditor to offset a “mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case.” § 553(a).

As both statutory provisions reflect, setoff requires a “mutuality” of obligation, and that both obligations arise prior to the filing of the petition for relief. *See generally, In re Lowe*, 97.1 I.B.C.R. 24, 26-7 (Bankr.D.Idaho 1997); 5 Collier on Bankruptcy (15th rev.ed.) ¶¶ 553.01[1] - [3], 553.03[1] -[3]. The objecting creditors and Trustees all assert that Lakeshore does not have the prerequisite “mutual debt” necessary for offset.⁴ They note that Lakeshore would simply be in possession of funds which include the 10% payable to the

⁴ *Bluegreen* also asserts that Lakeshore waived its alleged right to setoff by failing to assert earlier in the case. *See generally*, Collier, *supra* at ¶ 553.07. By virtue of the Court’s conclusions on the motion, it is unnecessary to resolve this assertion.

Debtors. Thus, they argue, Lakeshore is not a “debtor” to the estates in addition to being a creditor of the estates. Rather, it is simply a party which is in possession of property which constitutes property of the estate subject to turnover to the Trustee(s) for proper administration. *See* § 542.⁵

The Court agrees with the objecting creditors and the Trustees. The state court order authorized the receiver to liquidate all assets of the Debtor Defendants and to distribute the net proceeds thereof 90% to Lakeshore and 10% to the Mirths and the Mirth-related corporations. This constituted an entitlement of the respective parties to the funds held by the receiver but did not create a payment obligation of Lakeshore to the Mirth-related entities. (In fact, as argued by some of the objectors, it may have replaced a debtor-creditor relationship between the state court Plaintiffs and Defendants.)

⁵ Bluegreen also asserts that Lakeshore has retained the estate’s 10% share of net proceeds of assets previously liquidated under the state court order. The Court declines to address this matter upon Bluegreen’s opposition to the two pending motions. First, resolution of this issue is not required in order to dispose of Lakeshore’s § 362(d) and § 502(c) motions. Second, the Trustee, not a creditor, is the proper party to pursue turnover of property of the estate. And unless the Trustee and the opposing party are in a position to consensually resolve the matter with a minimum of expense, or agree to a more streamlined process, an adversary proceeding is likely required. *See* Rule 7001(1). The Court believes it would be inadvisable to attempt to address this issue upon the existing record.

The Court finds no pre-bankruptcy⁶, mutual debts sufficient for § 553 setoff purposes. Based thereupon, there is insufficient cause for granting relief from the automatic stay under § 362(d)(1), and Lakeshore's stay relief motion will therefore be denied.

Motion to estimate unliquidated claim

The Court may, under § 502(c), estimate for purposes of allowance any contingent or unliquidated claim, the fixing or liquidation of which would unduly delay the administration of the estate. The motion for estimation of Lakeshore's unliquidated claim was primarily driven by Lakeshore's need to have a "hard" claim upon which its alleged right of setoff could be asserted. The above determinations as to the absence of mutual prepetition debts necessary for setoff, and the denial of the motion for relief from stay, eliminate the need to estimate this claim.

There would appear to be no compelling reason why, in these complex and ongoing chapter 7 cases, the Court should at this time estimate any unliquidated claims. The claim adjudication process would appear to be capable of addressing these issues in the ordinary course.⁷ It is appropriate for

⁶ To the extent the distributive rights arise after bankruptcy, there is also clearly a problem with § 553's requirement of mutual, prepetition debts.

⁷ This process is the appropriate vehicle to consider any of the arguments made by creditors, in the context of these two motions, which are actually
(continued...)

the Trustees to continue the process of administering all assets of the estate.⁸

When the Trustee is in a position to consider closing the estate and making distribution on administrative expenses and allowed claims, the Court can revisit the question of estimating any claims which have not yet become sufficiently settled and/or amended in order to allow for administration.⁹

ORDER

Based upon the foregoing, Lakeshore's Motion for Relief from the Automatic Stay, and Lakeshore's Motion for Estimation of Unliquidated Claims are DENIED.

⁷(...continued)

objections to the claims asserted by Lakeshore. Filed claims are prima facie evidence of the validity and amount of claims. Rule 3001(f). If a creditor, or the Trustee, wishes to object to a claim, it must do so with specificity and with hearing on sufficient notice. Rules 3007, 9014.

⁸ This would appear to include any "10%" distributions to which the estates are entitled under the state court order.

⁹ The Trustee in the corporate cases asserted at hearing that the effect of the state court order was to eliminate any claim of Lakeshore against these estates other than the right to distribution of 90% of the net proceeds upon sale. The Court need not reach this contention in order to resolve the two pending Lakeshore motions. If still at issue at the time of closing of this estate, the Trustee's contentions can be addressed through a formal claim objection and resolution process.

Dated this 3rd day of September, 1999.

TERRY L. MYERS
UNITED STATES BANKRUPTCY JUDGE